No. 15853

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BEACHER GEORGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from the judgment of the United States District Court for the Southern District of California which adjudged appellant guilty under each count of a five-count Indictment returned by the Grand Jury for the Southern District of California on March 20, 1957, which Indictment was brought under the provisions of Section 174 of Title 21, United States Code [Clk. Tr. pp. 2-4, 10-11].

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [Clk. Tr. pp. 2-4].

The jurisdiction of the District Court is based upon Section 3231, Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the proceedings leading to said judgment by reason of the provisions of Section 1291 and 1294 of Title 28, United States Code.

II.

Statement of the Case.

The Indictment in this matter was returned March 20, 1957 [Clk. Tr. p. 4] in five counts, essentially charging the appellant with selling and facilitating the sale of certain quantities of heroin after said heroin was unlawfully imported, which unlawful importation was known to said appellant; and as to each of said sales, the dates, amounts of heroin and purchasers are as follows:

Count One: October 4, 1956, 99 grains sold to Dorothy Smith;

Count Two: November 1, 1956, 83 grains sold to Justin Burley;

Count Three: December 14, 1956, 348 grains sold to Malcolm P. Richards;

Count Four: January 4, 1957, 312 grains sold to Justin Burley;

Count Five: January 17, 1957, 185 grains sold to Justin Burley. [Clk. Tr. pp. 2-4.]

The appellant was arraigned on April 1, 1957, and on April 8, 1957, entered his plea of not guilty to each of the five counts of the Indictment [Clk. Tr. pp. 5, 18]; on May 7, 1957, trial was commenced before a jury, the Honorable Wm. C. Mathes, United States District

Judge, presiding [Clk. Tr. p. 18]; on May 15, 1957, the jury returned a verdict of guilty as to all five counts, which was then filed [Clk. Tr. p. 18].

On May 27, 1957, the trial judge sentenced the appellant to the custody of the Attorney General for imprisonment for a period of twenty years and to pay a $5,000 fine on Count One, the appellant to stand commited until the fine was paid or he was otherwise discharged; for imprisonment for twenty years on Count Two; said twenty-year sentences on Counts One and Two to commence and run concurrently; for imprisonment for twenty-years on Count Three; twenty years on County Four; twenty years on Count Five; the said twenty-year sentences imposed under Counts Three, Four and Five to commence and run consecutively to the time imposed on Counts One and Two and consecutively to each other, for a total period of imprisonment of eighty years [Clk. Tr. pp. 8-11].

Notice of Appeal was filed on June 7, 1957 [Clk. Tr. p. 12].

For the purpose of brevity, the facts pertinent to each of the counts will be discussed in the Argument relative to the sufficiency of the evidence to sustain the conviction.

III.

Argument.

A. The Evidence Received on Trial Was Substantial and Sufficient to Support the Judgment of Conviction.

It is axiomatic that an appellate court will not resolve conflicts in the evidence nor pass upon credibility of witnesses who appeared at trial, and that this Court will consider the evidence and all the fair and reasonable inferences that flow therefrom from the aspect most

favorable to supporting the verdict of the jury and the judgment of conviction.

Woodward Laboratories, Inc. et al. v. United States, 198 F. 2d 995, 998 (9 Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9 Cir., 1948); cert. den. 335 U. S. 853.

It is patent from appellant's Brief that the evidence was sufficient to support each of the counts of the Indictment when the foregoing test is kept in mind. Furthermore, appellant has apparently abandoned this point in his Argument (see p. 11 of Appellant's Br.) where he asserts only that there were discrepancies in the testimoney of witness Smith in respect to the transaction covered by Count One, there being no argument with respect to insufficiency of the evidence as to any other count. Nor has appellant elsewhere in his Brief shown what, if any, element of any of the offenses charged failed of proof.

Set forth below are the barest essentials of the evidence adduced on trial relative to each of the counts of the Indictment.

According to the testimony of the purchasers involved in each of the five counts of this Indictment, the following facts appear of record. On October 4, 1956, a special employee by the name of Thomas, in the company of Deputy Sheriff Smith, asked the appellant to sell some narcotics—$100 worth. The appellant asked Thomas and Smith to meet him at 89th and McKinley in Los Angeles fifteen minutes later, where Smith delivered to the Appellant $100 in cash. Immediately thereafter the appellant

asked Smith to wait while he showed Thomas where the narcotics were located which he, appellant, did, pointing at a package on the street, which Thomas picked up and handed to Smith [Rep. Tr. pp. 31-34].

Although there is some discrepancy in respect to the initialling of the package by Smith, it appears that the exhibit produced in court was the same package retrieved from the street, and this was definitely the package handed to Agent Richards some five minutes later on the same day [Rep. Tr. pp. 50-51, 123-124; Ex. 1B1].

As to Count Two, Justin Burley, a Deputy Sheriff, Los Angeles County, in the company of Thomas, met appellant on the street in Los Angeles on November 1, 1956, where Thomas was observed to converse with the appellant. Thereafter, pursuant to a conversation with Thomas, Burley left $100 in cash on the sidewalk which he later observed a small boy pick up and hand to the appellant [Rep. Tr. pp. 53-57]. A telephone call by appellant was received thereafter in which Thomas was advised as to the location of a package of heroin which was picked up by Thomas and Burley [Rep. Tr. pp. 57, 59, 133-134].

As to Count Three, Thomas called the appellant on December 14, 1956, to arrange for payment and delivery of the heroin [Rep. Tr. pp. 138-139], and thereafter $250 was delivered to the appellant by dropping it in the street [Rep. Tr. p. 143]. Shortly thereafter arrangements were made by 'phone between Thomas and appellant for the delivery of the heroin which was found in a washroom, pursuant to instructions given by the appellant [Rep. Tr. pp. 144-145].

Under the charge of Count Four, evidence was produced which showed that Deputy Sheriff Burley and Thomas saw the appellant on January 4, 1957, at his cafe where, inferentially, Thomas delivered $240 which he had received from Burley to the appellant, and later was observed to deliver an additional $10 to the appellant [Rep. Tr. pp. 61-64]. Thereafter Burley and Thomas left and later returned to the cafe where conversation ensued between Thomas and appellant, the appellant advising that the narcotics could be picked up from a hollow base of a tree, which narcotics were recovered by Deputy Sheriff Burley [Rep. Tr. pp. 65-68].

As to Count Five, Deputy Sheriff Burley saw the appellant on January 17, 1957 while with Thomas. A conversation occurred about the price being paid by Burley for the purchase of narcotics, which is clearly incriminatory. In this conversation arrangements were made for Burley and appellant to consummate another purchase [Rep. Tr. pp. 71-76]. Later in the day appellant delivered a package to Burley by throwing it into the car in which Burley was seated [Rep. Tr. pp. 80-82]. For this delivery appellant was paid $150 [Rep. Tr. pp. 112-113].

The purchaser's testimony, which is set forth in the briefest essence above, was corroborated in all observable details by Agent Richards of the Federal Bureau of Narcotics, Sergeant Landry, Deputy of the Los Angeles County Sheriff's Department and Deputy Sheriff Farrington (reference is made to their testimony as indexed in the transcript).

As a rebuttal witness, the special employee Thomas testified substantially the same as the purchasers in respect to each of the above transactions.

The contents of all packages recovered were by stipulation shown to have been heroin [Rep. Tr. pp. 197-198].

In some instance, the possession of narcotics is shown by direct evidence to have been in the possession of the accused. In other instances, the strongest inferences of constructive possession are shown by the record. This is sufficient to invoke the presumption of unlawful importation and knowledge thereof as set forth in the statute.

21 U. S. C., Sec. 174.

In *Brown v. United States,* 222 F. 2d 293 at 297, this court said:

> "In Mullaney v. United States, 9 Cir., 1936, 82 F. 2d 638, 642, this court approved an instruction of the trial court that 'possession of a thing means having in one's control or under one's dominion.' It is not necessary that possession be immediate or exclusive. Mullaney v. United States, supra; Borgfeldt v. United States, 9 Cir., 1933, 67 F. 2d 967."

The other elements of the offenses as charged, *i.e.,* sale or facilitation of sale, were shown directly by the evidence.

B. The Admonitions of Court to Counsel During the Course of Trial Were Not Prejudicial to the Defense.

The portion of the remarks occurring under this subject quoted by appellant is not complete. The Court is asked to read them in their entirety as they appear in the Reporter's Transcript at pages 107-108.

It would appear from the record that counsel's conduct was a continuing proposition up to this time since an earlier admonition occurs in the Reporter's Transcript at page 48.

Nowhere in the record does it appear that appellant's counsel was unduly restricted in his movements or at-

titude; nor has appellant pointed out any specific instances in which his defense was hindered or prejudiced by the court's admonition. Clearly the matter did not affect the jury's deliberations since the admonition complained of occurred in their absence [Rep. Tr. p. 107]. The admonition contains in it findings of fact as to the apparent misconduct of counsel. Under these circumstances it was the court's duty to preclude the influence of personality upon the jury.

Federick v. United States, 163 F. 2d 536, 547 (9 Cir., 1947);

Kettenbach v. United States, 202 Fed. 377, 385 (9 Cir., 1913);

Callahan v. United States, 35 F. 2d 633 (10 Cir., 1929);

Coupe v. United States, 113 F. 2d 145, 149 (D. C. Cir. 1940);

John E. Smith's Sons Co. v. Latimer Foundery & Machinery Co., 19 F. R. D. 379, 390 (U. S. D. C., Pa., 1956);

Norwood v. Great American Indemnity Co., 146 F. 2d 797, 800 (3 Cir., 1944);

Goldstein v. United States, 63 F. 2d 609 (9 Cir., 1933);

United States v. Katz, 173 F. 2d 116 (3 Cir., 1949);

and compare:

United States v. Angelo, 153 F. 2d 247, 251 (3 Cir., 1946).

Appellee has no quarrel with cases cited by appellant as to the necessity of counsel, but points out to this Court

that it must first be *demonstrated* that there was some infringement on trial with the functioning of counsel, which is not shown here.

C. The Imposition of a Term of Imprisonment Within the Statutory Bounds Set by Congress Is Within the Discretion of the Trial Judge.

Appellant cites no cases in support of his position that the sentence was unduly severe or unreasonable. This matter was recently before this Court, and it was held that such a matter is within the discretion of the trial judge and not reviewable by the appellate court so long as the sentence fell within the bounds prescribed by statute.

Brown v. United States, 222 F. 2d 293, at 298 (9 Cir., 1955), and cases there cited.

And compare the recent decision of *Gore v. United States,* decided by the Supreme Court on June 30, 1958, being No. 668; Title 21, United States Code, Section 174.

IV.

Conclusion.

That there is sufficient and substantial evidence to support the conviction; that there was no prejudice to the defense; and that the sentence imposed by the court was within the limits of the statute and discretionary with the trial judge is respectfully submitted.

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